



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 72 OF 2019

MOSES KIMAIYO KIPSANG.....PLAINTIFF

VERSUS

GEOFREY KIPROTICH KIRUI.....1ST DEFENDANT

JOYCE KOECH.....2ND DEFENDANT

DOMINIC KIPROTICH.....3RD DEFENDANT

RULING

1. The application dated 3/12/2019 which was filed in court on the same date has been brought by the plaintiff. It seeks the following orders:-

(a) ...spent

(b) ...spent

(c) That pending the hearing and determination of the suit herein this court be pleased to issue a temporary injunction restraining the defendants, their agents or servants from trespassing in, fencing, dealing, selling or in any manner whatsoever interfering with the plaintiff's quiet use, possession and/or interest in that land known as land title No. LELAN/KAPTALAMWA/123.

(d) That an order directing the County Surveyor Elgeyo Marakwet County to visit, survey, ascertain and fix the common boundary between the plaintiff's land title No. LELAN/KAPTALAMWA/123 and land title No. CHERANGANY/KORONGOI/39 and file a report in court.

(e) That the order issued herein be served upon the OCS Kapcherop Police Station to ensure compliance.

(d) That the costs be in the cause.

2. The applicant has brought the application under Sections 1A, 1B, 3 and 3A and 63(c) of the Civil Procedure Act, Order 40 Rules 2 and 4(1) of the Civil Procedure Rules (2010).

3. The grounds upon which the application is made are that the plaintiff is the registered owner of the suit land while the defendants are the beneficial owners of a land parcel known as Cherangany/Korongoi/39 which parcels share a common boundary; that in 2015 the defendants encroached on the plaintiff's parcel destroying the common boundary and hiving off 1.0 acres on which they built several dwelling houses; that the defendants have been hostile and have refused to co-operate with the surveyor in the reinstatement and fixing of the common boundary.

4. The application is supported by an affidavit of the plaintiff, sworn on 3/12/2019 amplifying the above grounds.

5. In reply to the application, the 2nd defendant filed replying affidavit sworn on 28/1/2020 on her own behalf and on behalf of the 1st and 3rd defendants. In that affidavit she admits that the plaintiff is the registered proprietor of the suit land; that she is the widow to **Johnstone Kipkoech Kipsang** who died in 2007 and who was the son of **Kipsang Kisoo** who died in 2005; that Kipsang Kisoo had bought parcel No. **Elgeyo/Marakwet /Lelan/Kaptalamwa/123** from **Kimaiyo Arap Kipsang** and the same **Kimaiyo Kipsang** surrendered to him the original

title which the deponent's family have retained while awaiting the finalization of the succession proceedings to enable transfer; that she and her family have lived on the suit land since 1977 without interruption and the remains of her husband are buried thereon; that the plaintiff employed forgery to obtain another title deed in his name on 22/9/2015; that no claim has ever been raised by the plaintiff regarding the suit land since 1977; that parcel No. **Cherangany/Korongoi/39** belonged to her family; that there is no boundary dispute between the two parcels and that the plaintiff does not own the disputed land.

6. The defendants filed their submissions on 21/2/2020. I have perused through the court record and found no submissions filed by the plaintiff.

7. I have considered the application, response and the filed submissions.

8. The main issues for determination in the instant application are as follows:

a. Whether pending the hearing and determination of the suit herein this court should issue a temporary injunction restraining the defendants, their agents or servants from trespassing in, fencing, dealing, selling or in any manner whatsoever interfering with the plaintiff's quiet use, possession and/or interest in that land known as land title No. LELAN/KAPTALAMWA/123.

b. Whether an order should issue directing the County Surveyor Elgeyo Marakwet County to visit, survey, ascertain and fix the common boundary between the plaintiff's land title No. LELAN/KAPTALAMWA/123 and land title No. CHERANGANY/KORONGOI/39 and file a report in court.

9. I have considered the application and the reply. It appears that the plaintiff is aware that the defendants are in occupation of the disputed land hence the prayer for their eviction contained at the foot of the plaint.

10. This court is bound to consider the principles for the grant of a temporary injunction laid out in the **Giella Cassman Brown [1973] EA 358** and affirmed in **Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others [2003] eKLR** as follows:

“(a) The applicant must show a prima facie case with probability of success.

(b) An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages.

(c) If the court is in doubt it would decide an application on the balance of convenience.”

11. A prima facie case was defined as follows in the **Mrao case** (supra)

“A prima facie case includes but is not confined to a “genuine and arguable case.” It is a case which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

12. Has the plaintiff established a prima facie case? The plaintiff avers in the plaint that the defendants entered the suit land in the year 2015.

13. The defendants are on the suit land. They claim to have occupied the suit land, which is adjacent to another parcel they had earlier on acquired, by virtue of a sale agreement between the 1st respondent's fathers-in-law, one Kisang Kisoo in the year 1977; upon that agreement's execution the original title deed was surrendered to the buyer. It is also alleged that the defendants have been in possession of the land since 1977.

14. In this court's view the main fact that has been revealed is that the defendants are in occupation of the land. Their period of occupation is disputed. Nevertheless, it follows that if an order issues for an injunction it may have the unnecessary effect of interfering with their occupation before this suit has been heard, just like a mandatory injunction would. Worse still it may lead to their constructive eviction from the suit land. This is contrary to the principle that a mandatory injunction should not issue at an interlocutory stage save in very special cases. I do not find that the plaintiff has established that the defendants only recently and in the pendency of this suit tried to steal a march on him in the proceedings by invading the suit land. Consequently, this court is not convinced that the order of a temporary injunction is deserved.

15. Regarding the second issue of fixing of boundary by a surveyor, it is the opinion of this court that it should be addressed once the parties agree that the pleadings are closed, as that is the time that the issues in the suit may be deemed to be fully crystallised.

16. The upshot of the foregoing is that, this application must be determined on a balance of convenience, and in my view the balance of convenience lies in maintaining the *status quo* pending the hearing and determination of the main suit.

17. I therefore issue the following orders:

a. The parties shall maintain the current *status quo* on the suit land pending the hearing and determination of the suit.

b. The costs of the application shall be in the cause.

It is so ordered.

Dated, signed and delivered at Kitale on this 10th day of March, 2020.

MWANGI NJOROGE

JUDGE

10/3/2020

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Ondari holding brief for Teti for plaintiff

N/A for the defendant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

10/3/2020.